

March 30, 2010

BY ELECTRONIC MAIL

The Honorable David Michaels, PhD, MPH
Assistant Secretary of Labor for Occupational Safety and Health
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210
Electronic Address: <http://www.regulations.gov> (RIN 1218-AC45; Docket No. OSHA-2009-0044)

Re: Comments on OSHA's Proposed Occupational Injury and Illness Recording and Reporting Requirements Rule

Dear Assistant Secretary Michaels:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the Occupational Safety and Health Administration's (OSHA) *Proposed Occupational Injury and Illness Recording and Reporting Requirements Rule (MSD Reporting Rule)*.¹ OSHA's proposed rule would require employers with 10 or more employees (unless exempt) to record certain work-related musculoskeletal disorders (MSDs) in their OSHA 300 Log (also known as an OSHA Form 300).² An OSHA 300 Log is a record of work-related injuries and illnesses that certain employers are required to maintain.³ A more detailed summary of the proposed rule is provided below.

Office of Advocacy

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁵ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required

¹ 75 Fed. Reg. 4728 (January 29, 2010).

² *Id.*

³ A copy of OSHA's 300 Log and instructions can be found at <http://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>.

⁴ 5 U.S.C. § 601 et seq.

⁵ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁶ Moreover, Executive Order 13272⁷ requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

As discussed in the proposed rule, OSHA is proposing to require employers with 10 or more employees (unless exempt) to record certain work-related musculoskeletal disorders (MSDs) in their OSHA 300 Log. An OSHA 300 Log is a record of work-related injuries and illnesses that certain employers are required to maintain. Currently, these employers are required to report any employee injuries and illnesses that are: 1) work related; 2) new (i.e., not a recurrence); and that, 3) result in medical treatment beyond first-aid, job transfer or restriction, or days away from work.⁸ The proposed rule would add a new column to the 300 Log specifically for recording MSDs; however, OSHA does not indicate where on the OSHA 300 Log this new column would be located, or whether a MSD is an injury, illness, or a hybrid/combination of the two.

MSDs are defined by OSHA as “disorders of the muscles, nerves, tendons, ligaments, joints, cartilage and spinal discs.”⁹ Further, the proposed rule clarifies that MSDs “do not include disorders caused by slips, trips, falls, motor vehicle accidents, or other similar accidents.”¹⁰ The proposed rule gives examples of MSDs, including “Carpal tunnel syndrome, Rotator cuff syndrome, De Quervain's disease, Trigger finger, Tarsal tunnel syndrome, Sciatica, Epicondylitis, Tendinitis, Raynaud's phenomenon, Carpet layers knee, Herniated spinal disc, and Low back pain.”¹¹ As OSHA explains, the definition of MSDs is not precise and there are various definitions about what MSDs are and how to define them.¹² An “injury or illness” is defined in OSHA’s current recordkeeping rule as

⁶ In addition, for any proposed OSHA rule that is expected to have a significant economic impact on a substantial number of small entities, the agency is required to convene a small business review panel (commonly known as a SBREFA Panel) prior to publishing the proposed rule to review any materials the agency has prepared about the rule (including any draft proposed rule), obtain the advice and recommendations of small entities that might be affected by the rule, and report on the comments of the small entity representatives and the agency’s findings as to the number of small entities to which the rule would apply, recordkeeping and other compliance costs, and any significant alternatives that would accomplish the stated objectives in a less burdensome manner for small entities. *See*, 5 U.S.C. 609(b).

⁷ Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. 53461) (August 16, 2002).

⁸ 75 Fed. Reg. 4729.

⁹ 75 Fed. Reg. 4733.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

“an abnormal condition or disorder.”¹³ This definition would be revised to include “pain, tingling, burning, numbness or any other subjective symptom of an MSD.”¹⁴

OSHA first proposed in 2001 to require employers to record MSDs in a separate column of their OSHA 300 Logs.¹⁵ However, the agency later reversed that decision because it concluded that the information gleaned from such a requirement would not be particularly useful or valuable.¹⁶ The agency has now reversed itself again and concluded that the inclusion of an MSD column would provide valuable information on national occupational injury and illness statistics, assist the agency in targeting its inspection, outreach, guidance, and enforcement efforts, and provide valuable information at the establishment level that will be useful for both employers and employees.¹⁷

OSHA has certified under the RFA that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.¹⁸ Accordingly, the agency did not convene a small business (SBREFA) review panel for this proposed rule. The agency states that the proposed rule would simply require employers to check a new MSD box on their OSHA 300 Log and that employers are already required to report this information on the current form. As such, the agency concludes that compliance with the proposed rule would involve five minutes per employer to become familiar with the new rule and one minute per MSD injury or illness to check the new box.¹⁹

Small Entities Have Expressed Serious Concerns With The Proposed Rule

Following publication of the proposed rule, a number of small business representatives contacted Advocacy and expressed serious concerns about the proposed rule. Advocacy has discussed the proposed rule with small business representatives, obtained input from them during our regular small business labor safety roundtables, and attended OSHA’s public meeting on the proposed rule where a number of small business representatives spoke about the proposal. The following comments are reflective of the issues raised during these discussions and at OSHA’s public meeting and are limited to OSHA’s RFA certification.

- 1. Small business representatives believe that OSHA has dramatically understated the cost and complexity of complying with the proposed rule.** Contrary to OSHA’s assertion that the proposed rule will only require five minutes per employer to become familiar with the new rule and one minute per MSD injury or illness to check the new box (at an average cost of \$4.00 per establishment in the first year and

¹³ 29 CFR 1904.46 (*Injury or illness*). An injury or illness is an abnormal condition or disorder. Injuries include cases such as, but not limited to, a cut, fracture, sprain, or amputation. Illnesses include both acute and chronic illnesses, such as, but not limited to, a skin disease, respiratory disorder, or poisoning. (Note: Injuries and illnesses are recordable only if they are new, work-related cases that meet one or more of the Part 1904 recording criteria.)

¹⁴ 75 Fed. Reg. 4734.

¹⁵ 75 Fed. Reg. 4730.

¹⁶ *Id.*

¹⁷ 75 Fed. Reg. 4729.

¹⁸ 75. Fed. Reg. 4736.

¹⁹ 75 Fed. Reg. 4737.

67 cents per year thereafter), small business representatives believe the rule will require more time and expense. Specifically, small business representatives noted that many small employers lack the sophistication to read and analyze new federal regulations and many do not employ regulatory professionals who can perform this task. Accordingly, many small businesses will have to hire attorneys and consultants to advise and train them on the new requirements. Neither the full cost of time spent analyzing this new federal requirement nor costs associated with consultations are included in the analysis.

In addition, small business representatives stated that the proposed rule would require more than the mechanical checking of a MSD box as OSHA asserts. Currently, if an employee has a reportable injury or illness, the employer records it as either an injury or illness (it is unclear which OSHA considers a MSD to be). However, under the proposed rule, the employer would now be required to diagnose whether the injury or illness is a MSD and make complex medical evaluations they are not qualified to make. This is problematic and costly for several reasons. First, because the definition of MSDs is complex and confusing, many small businesses will be unable to evaluate and assess whether the injury or illness is in fact a MSD. This will cause many small employers to engage in additional consultation with the employee, consult with medical professionals, and refer more employees for professional diagnosis. Second, small businesses will have to evaluate whether a potential MSD is work-related, new, and whether a particular “subjective symptom” is sufficient to trigger a reportable MSD. Because MSDs can develop from both personal and work activities over time and may not exhibit apparent symptoms, this is not an easy assessment to make. Third, the determination is consequential because if an employer misdiagnoses and improperly records a MSD they will be in violation of OSHA’s recordkeeping rule and be subject to penalties and other enforcement actions. Fourth, while OSHA assumes that OSHA 300 logs are maintained by human resource specialists, many small businesses do not employ such professionals and the task of evaluating and recording possible MSDs will fall on small business owners, other senior personnel, or outside professionals, and will be far more costly than OSHA estimates.

Finally, small business representatives stated that OSHA has omitted various other costs, such as modifying and updating software, training employees, and revising their policies and procedures to account for the new MSD requirements. Based on the foregoing, Advocacy recommends that OSHA assess the validity of its cost assumptions before proceeding with this rule.

- 2. OSHA may lack a factual basis to certify the proposed rule under the RFA.** In order for OSHA to certify under the RFA that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities, the agency must provide a factual basis for its certification.²⁰ OSHA’s assumption that the only costs associated with the proposed regulation are five minutes to become familiar with the new rule and one extra minute to record each

²⁰ 5 U.S.C. 605(b).

MSD entry is called into question by the above comments. Accordingly, Advocacy is concerned that OSHA has understated the costs of the rule to small entities and may not have a factual basis to certify the proposed rule under the RFA. Further, judging from some of the questions contained in the proposed rule (and asked during the public meeting), it does not appear that OSHA adequately understands what small entities do to comply with the existing rule or what they would have to do in the future under the proposed rule.²¹ For these reasons, Advocacy recommends that OSHA reassess its certification that the proposed will not, if promulgated, have a significant economic impact on a substantial number of small entities.

Conclusion

Advocacy appreciates the opportunity to comment on OSHA's *Proposed Occupational Injury and Illness Recording and Reporting Requirements Rule*. Please feel free contact me or Bruce Lundegren (at (202) 205-6144 or bruce.lundegren@sba.gov) if you have any questions or require additional information.

Sincerely,

/s/

Susan M. Walthall
Acting Chief Counsel for Advocacy

/s/

Bruce E. Lundegren
Assistant Chief Counsel for Advocacy

Copy to: The Honorable Cass R. Sunstein, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget

²¹ For example, OSHA requests comment on current employer practices regarding recording, tracking, and analysis of MSDs in workplaces, the extent that employers use restricted work and job transfer instead of time away from work for managing MSDs, whether the MSD column would result in additional costs to employers, what MSD definitions employers are using currently and for what purposes, and whether employers use computer software for recordkeeping. *See*, 75 Fed. Reg. 4733, 4737.